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United States
Circuit Court of Appeals
For the Ninth Circuit.

JAMES McCORMICK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Western District of Washington,
Southern Division.

FILED
FEB 7 - 1920
PUBLIC CLERK,
CLERK

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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District Court of the United States, Western Dis-
trict of Washington, Southern Division.

July, 1927, Term.

No. 6415.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES McCORMICK,

Defendant.

INFORMATION.

BE IT REMEMBERED, that Thos. P. Revelle,
Attorney of the United States of America for the
Western District of Washington, who for the said

*Page-number appearing at the foot of page of original certified
Transcript of Record.

United States in this behalf prosecutes in his own person, comes here into the District Court of the said United States for the District aforesaid on this 29th day of November, 1927, in this same term, and for the said United States gives the Court here to understand and be informed *that*:

FIRST COUNT.

That on the fifth day of July, in the year of our Lord one thousand nine hundred and twenty-seven, near the city of Tacoma, in the Southern Division of the Western District of Washington and within the jurisdiction of this court, JAMES McCORMICK, then and there being, did then and there knowingly, willfully, and unlawfully sell certain intoxicating liquor, to wit: Twenty-three (23) ounces of a certain liquor known as distilled spirits, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, and which said sale by the said JAMES McCORMICK, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known [2] as the National Prohibition Act; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

And the said United States Attorney for the said Western District of Washington further informs the Court:

SECOND COUNT.

That on the seventh day of July, in the year of our Lord one thousand nine hundred and twenty-seven, near the city of Tacoma, in the Southern Division of the Western District of Washington and within the jurisdiction of this court, JAMES McCORMICK, then and there being, did then and there knowingly, willfully, and unlawfully sell certain intoxicating liquor, to wit: Thirty-two (32) ounces of a certain liquor known as distilled spirits, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, and which said sale by the said JAMES McCORMICK, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

And the said United States Attorney for the said Western District of Washington further informs the Court:

THIRD COUNT.

That on the twenty-second day of July, in the year of our Lord one thousand nine hundred and twenty-seven, near the city of Tacoma, in the Southern Division of the Western District of Washington, and within the jurisdiction of this court, JAMES [3] McCORMICK, then and there be-

ing, did then and there knowingly, willfully, and unlawfully have and possess certain intoxicating liquor, to wit: Three (3) gallons of a certain liquor known as wine, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown intended then and there by the said JAMES McCORMICK for use in violating the Act of Congress passed October 28, 1919, known as the National Prohibition Act, by selling, bartering, exchanging, giving away, and furnishing the said intoxicating liquor, which said possession of the said intoxicating liquor by the said JAMES McCORMICK, as aforesaid, was then and there unlawful and prohibited by the Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And the said United States Attorney for the said Western District of Washington further informs the Court:

FOURTH COUNT.

That prior to the commission by the said JAMES McCORMICK, of the said offense of possessing intoxicating liquor herein set forth and described in manner and form as aforesaid, said JAMES McCORMICK, on the 5th day of October, 1920, in cause No. 3038, at Tacoma in the United States District Court for the Western District of Wash-

ington, Southern Division, was duly and regularly convicted of the offense of possession intoxicating liquor on the 14th day of July, 1920, in violation of the said Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and [4] against the peace and dignity of the United States of America.

And the said United States Attorney for the said Western District of Washington further informs the Court:

FIFTH COUNT.

That JAMES McCORMICK, from the fifth day of July to the twenty-second day of July, inclusive, in the year of our Lord one thousand nine hundred and twenty-seven, near the city of Tacoma, in the Southern Division of the Western District of Washington, and within the jurisdiction of this court, and at a certain place situated on the Pacific Highway South of Tacoma, Washington, and known as the Seven-Mile House, then and there being, did then and there and therein knowingly, willfully, and unlawfully conduct and maintain a common nuisance by then and there manufacturing, keeping, selling, and bartering intoxicating liquors, to wit: Distilled spirits, wine, and other intoxicating liquors containing more than one-half of one per centum of alcohol by volume and fit for use for beverage purposes, and which said maintaining of such nuisance by the said JAMES McCORMICK, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28,

1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THOS. P. REVELLE,

United States Attorney.

JOHN T. McCUTCHEON,

Assistant United States Attorney.

[Endorsed]: Filed Nov. 29th, 1927. [5]

COPY OF RECORD FROM U. S. DISTRICT
COURT JOURNAL.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma in the Southern Division of said District on the 17th day of December, 1927, the Honorable EDWARD E. CUSHMAN, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal Record of said *cause* as follows:

[Title of Cause.]

ARRAIGNMENT AND PLEA.

On this 17th day of December, 1927, defendant with J. F. O'Brien as his attorney is in court and is arraigned. He enters a plea of not guilty and this cause is passed to January 9, 1928, for assignment. [6]

VERDICT.

We, the jury in the above-entitled cause, find the defendant James McCormick is guilty as charged in Count I of the information filed herein; and further find the defendant James McCormick is guilty as charged in Count II of the information filed herein; and further find the defendant James McCormick is guilty as charged in Count III of the information filed herein; and further find the defendant James McCormick is guilty as charged in Count V of the information filed herein.

Z. B. SHAY,
Foreman.

[Endorsed]: Filed Sep. 28, 1928. [7]

MOTION FOR NEW TRIAL.

Comes now the defendant and moves the Court for a new trial herein for the following reasons:

I.

That the jury has received evidence not allowed by the Court.

II.

Misconduct of the jury.

III.

Errors of law occurring at the trial and excepted to by the defendant.

IV.

That the verdict is contrary to law and the evidence.

J. F. O'BRIEN,
Attorney for the Defendant.

Service of the foregoing motion for new trial admitted this 2d day of October, 1928.

JOHN T. McCUTCHEON,
Assistant U. S. Attorney.

[Endorsed]: Filed Oct. 2, 1928. [8]

COPY FROM JOURNAL RECORD OF U. S.
DISTRICT COURT.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division of said District on the 13th day of October, 1928, the Honorable EDWARD E. CUSHMAN, United States District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal Record of said court as follows:

[Title of Cause.]

HEARING AND ORDER DENYING NEW
TRIAL.

On this 13th of October, 1928, a motion for new trial in this cause is presented by J. F. O'Brien for defendant, which motion is submitted without argument and is denied and exception allowed. The

Court pronounces sentence at this time, imposing fine and judgments of imprisonment and orders that he pay the costs of his prosecution for which judgment is rendered against him, execution for costs to issue against him upon motion of the district attorney. [9]

COPY OF RECORD FROM JUDGMENT AND
DECREE JOURNAL.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma in the Southern Division of said District on the 13th day of October, 1928, the Honorable EDWARD E. CUSHMAN, United States District Judge presiding, among other proceedings had, were the following, truly taken and correctly copied from the Judgment and Decree Journal of said court as follows:

No. 6415.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES McCORMICK,

Defendant.

JUDGMENT AND SENTENCE.

On this 13th day of October, 1928, defendant James McCormick is before the Court for sentence, and being informed of the information filed against him in this cause and of his conviction of

TESTIMONY OF G. A. GRALTON, FOR THE
GOVERNMENT.

Testimony of G. A. GRALTON called as a witness in behalf of the Government, after being duly sworn, was examined and testified as follows:

Direct Examination by Mr. McCUTCHEON.

My name is Gregory A. Gralton. I am a Federal Prohibition Agent working in the Tacoma office, and was so working on July 5, 1927. My identity as a Federal Prohibition Agent was not disclosed at that time. I know the defendant Jim McCormick and the premises known as Seven Mile House, said premises are on the Pacific Highway just outside the city limits on the right-hand side going out, near the Raviola Inn. I was there on July 5, 1927, at about 6:30 o'clock P. M. with five or six companions. We met Jim McCormick at the front part, which was a service station and garage, and Gibson told him we wanted to buy a drink. He ushered us back to the kitchen, he used this place as a residence also, the back part of it, so we went to the kitchen. It was not a restaurant; I could just see that it had been used as a kitchen, somebody had been eating there. Jim McCormick served us each a drink and I paid him for the drinks at the rate of twenty-five cents each. It seems to me that I paid it to Mr. McCormick and I believe he put it in his pocket. Then I called for a pint of whiskey and McCormick sold me a pint. This was on July 5, 1927. Exhibit No. 1 is the pint that I bought

(Testimony of G. A. Gralton.)

from Jim McCormick on July 5, 1927. From my experience as a Federal Prohibition Officer the drinks bought at that time were liquor, distilled spirits, moonshine whisky, with alcoholic content over one-half of one per cent of alcohol by volume and fit for use as a beverage. I turned Exhibit No. 1, after labeling it, over to Mr. Kinnaird. On July 7, 1927, I was back to the same premises at about 2:30 P. M. with the same party of [12] men and Agent Van Campen and went to the kitchen of McCormick's place. McCormick met us at the front of the place and let us back into the kitchen, and both Agent Van Campen and myself bought a round of drinks at twenty-five cents each. This was on July 7th, and from my experience as a prohibition officer would say that the drinks contained more than one-half of one per cent of alcohol by volume and were fit for use for beverage purposes. Shortly after this Agent Van Campen called for and was sold by James McCormick a pint of whiskey. I saw the transaction and Exhibit No. 2 is the pint of whisky which Van Campen purchased from McCormick on July 7th, and will say that it contained more than one-half of one per cent of alcohol by volume and is fit for use for beverage purposes. This exhibit was also turned over to Agent Kinnaird, after I had labeled it for evidence.

Cross-examination by Mr. O'BRIEN.

The labels on exhibits 1 and 2 were written by me, but the initials on the labels I did not write. I was at McCormick's place on July 5, 1927, with

(Testimony of G. A. Gralton.)

a man by the name of Gibson and other men, whose names I do not know, but at that time I believe they were special deputy sheriffs. I think that was the title they had. And they together with Van Campen and myself were getting evidence at other places along about that time. I do not know where Mr. Gibson or Mr. Kelley are now. Mr. Van Campen was at that time a prohibition officer. We went there this night of the 5th about 6:30. It seems to me when I first saw McCormick he was standing near the entrance to his service station. I never saw him before, but one of the boys told me he was McCormick. We started out about noon that day, if I am not mistaken, and probably had not been to any other place that day, maybe one or two. In some places I visited I drank and others [13] we purchased. Possibly I drank one glass that afternoon before I visited McCormick. I remained a few minutes, about ten or fifteen minutes at the place, evidently some of the rest of the party knew Mr. McCormick. I don't know if this is Mr. McCormick's home. I saw a bedroom and dining-room which had been occupied, which were connected with the kitchen I spoke of before.

I don't know the names of the other parties, except Gibson and Kelley. We had picked them up in the afternoon and we all traveled around together in automobiles. July 5th was the first day I worked with these people. On the 7th we came there about 2:30 with practically the same people. We may have been at a couple of other places be-

(Testimony of G. A. Gralton.)

fore going there, and Mr. Van Campen was with me and bought a pint of liquor, and James McCormick sold other liquor besides this pint.

Redirect Examination by Mr. McCUTCHEON.

Had a conversation of a casual nature with the defendant and was only there a few minutes, the first time, about the same length of time at each visit, ten or fifteen minutes. I may have drank one glass of whisky before coming there and I may not have drank any, and I don't recall whether I drank any on July 7th before going to McCormick's. I had not visited over three or four places and a couple of these I got bottles and it was not necessary to take a drink. I was not intoxicated on July 5th or 7th.

Recross-examination by Mr. O'BRIEN.

I said it was intoxicating liquor that I bought.
[14]

TESTIMONY OF W. H. KINNAIRD, FOR THE GOVERNMENT.

Testimony of W. H. KINNAIRD, called as a witness in behalf of the Government, after being duly sworn, was examined and testified as follows:

Direct Examination by Mr. McCUTCHEON.

My name is W. H. Kinnaird and I am Deputy Prohibition Administrator in Tacoma. I know the premises known as the Seven Mile House and know the defendant when I see him. I was out there on July 22, 1927, with three agents and Customs In-

(Testimony of W. H. Kinnaird.)

spector Ballinger. Jim McCormick was not at the place when we arrived. There was a man there attending the gasoline pump and I told him we had a warrant and went in. After searching for some time I found a trap in the wall between the two bedrooms. There was a closet and on the wall I found a trap into the wall. There was a coat hanger and by pushing up on the coat hanger the boards would slide in the groove, and you could see the wine in there. This closet wall was between the two bedrooms, between the walls there was about three feet of space between the two rooms, and there were two or three separate compartments and this wine was in there, and there were some empty bottles, and three gallons of wine, marked as Exhibit No. 3. After I seized it I took the sample to the United States chemist at Seattle. The chemist's name is Hugo Ringstrom. Exhibit No. 3 was taken out of this cache spoken of. Exhibit No. 1 was turned over to me by Agent Gralton and I put it in the vault in the Federal Building, of which I have custody of, and brought it to court to-day Exhibit No. 1 was offered in evidence and admitted. Witness identified Exhibit No. 2 and it was admitted.

I received Exhibit No. 3 from the chemist and brought it back and put it in the vault and have had possession of it ever since. In the kitchen we found another cache built just like [15] the one we found in the closet. We found various bottles and jugs out in the garage. I went out and found

(Testimony of W. H. Kinnaird.)

a cache in the garage. Up near the top of the garage was a spring—looked like a wall but there was some way to open it and it came down and there was a bunch of kegs up there that had contained whisky. I do not know how many but quite a few. The kegs were ten and five gallon kegs. The cache in the garage was not an old one. It had been used quite a bit but I do not think the building had been there very long. I had two or three conversations with the defendant when he first came up. When we were searching a dresser there in the place there was a box containing twenty-five or thirty silver dollars, and I turned it over to the garage attendant, and told him he better take the money. Mr. McCormick was not there when I came. I told him I had given this man the money and he said it was all right to keep it. He came to me and he said, “Kinnaird, I want to ask you a question and I know you will tell the truth.” I said if I told him anything it would be. He said, “Have you got ‘buys’ on me?” and I said, “Yes, Jim, I have had a couple of men make buys of whisky.” He said, “Yes, that’s right, but they didn’t buy any wine.” I said, “No, I am not claiming they bought any wine.” That was in the presence of Jim McCormick and Raney.

Cross-examination by Mr. O’BRIEN.

You related that conversation once before, Mr. Kinnaird, I heard that once before. Answer: I do not recall testifying in the preliminary hearing.

(Testimony of W. H. Kinnaird.)

Q. Isn't it a fact that he said no such thing as "That's right," that he said to you, "You have no sales of wine?"

A. He said, "That's right," or "That's true," "but," he said, "I haven't sold any wine," I said, "No, we are not claiming you [16] sold any wine." Mr. McCormick may be pretty hard of hearing. I have talked to him several times and have never had any trouble making him hear me. Referring to Exhibit No. 3 I do not recall how long it was after I received it before it was analyzed. I would say about ten days, maybe more, maybe less. July 22d was the first time I ever searched the McCormick place. It is not a fact that our office had searched that place two or three times in the year prior to this. We found Exhibit No. 3, in the cache together with two other gallons of the same material. Mr. McCormick complained after the raid that he had lost his naturalization papers and some money. Someone took an ax and pried open the dresser as it had a Yale lock on it. The dresser was a large one, full of papers and a little of everything. There was a locked car standing in the garage. It was an enclosed car with windows in it, and somebody took an ax and pried it and the door came open. It made a small mark on the car, nothing but a little bulge. We did not find anything in the car. I am acquainted with Mr. Van Campen and saw him about a week ago.

(Testimony of W. H. Kinnaird.)

Redirect Examination by Mr. McCUTCHEON.

I do not know if Mr. Van Campen was subpoenaed. I talked with the clerk in your office and told her I needed him. I have known James McCormick since July, 1926. I was out to his place a number of times before July but never searched his premises.

Q. Do you know the reputation of these premises on and between the dates July 5, 1927 and July 22, 1927, as a place where intoxicating liquor was bought and kept?

Mr. O'BRIEN.—Don't answer. [17]

Mr. McCUTCHEON.—Well, and or kept.

Mr. O'BRIEN.—If your Honor please, I object to that as incompetent, irrelevant and immaterial—not proper to show the reputation of a place where the evidence itself shows that if there has been a violation of the law, that that violation was done by the defendant himself.

The COURT.—I take it every case is more or less to be governed by the evidence in that particular case. Now, this statute making it a nuisance, not only making the place a common nuisance where intoxicating liquor is manufactured and sold, but also where it is kept. I don't see why the rule you have invoked, why it would be applicable here to this place and the garage whether it was a nuisance or not.

Objection overruled. Exception allowed.

Mr. McCUTCHEON.—You may answer.

(Testimony of W. H. Kinnaird.)

A. I do.

Q. What was that reputation?

Mr. O'BRIEN.—Same objection.

The COURT.—Overruled.

Mr. O'BRIEN.—Exception.

The COURT.—Allowed.

A. It had a reputation of being a place where liquor was kept and sold.

The COURT.—The jury are instructed that the last count in this information, being the fifth count, accuses the defendant of maintaining a common nuisance on the Pacific Highway, known as the Seven Mile House, by then and there manufacturing, keeping, selling and bartering intoxicating liquor, distilled spirits, wine and other intoxicating liquor, containing more than one-half of one per cent of alcohol by volume, fit for use for beverage purposes. Now, you will observe there are [18] two main accusations, that is, the place, it is asserted the place was a common nuisance and asserted that the defendant maintained it as a common nuisance. Now, so far as the place is concerned, the prosecution is entitled to have evidence of the reputation of the place as a place where liquor was kept and sold considered by the jury, but so far as the question is concerned of whether the defendant had anything to do with maintaining that place—that's a separate question and you have no right to consider evidence of reputation as bearing on that last question.

(Testimony of W. H. Kinnaird.)

Cross-examination by Mr. O'BRIEN.

I was never out there until the 22d of July to raid it. I have been in office since July, 1926, and was connected with the office for some time prior to that. I talked to people before and after the raid as to the reputation. I have talked to others beside officers. I have had many people come to my office and tell me about this place. I could not say exactly [19] how long before the 5th of July. I did not make any search of this place before as I could not. I had reliable information that the place was being maintained as a common nuisance but I would have to procure a search-warrant and that would not be sufficient, because it is his home. I did not have any sales before the 5th of July. I cannot recall anybody who spoke to me because these people are reluctant to give their names, either over the phone or when they come to my office.

TESTIMONY OF CHARLES H. GRIFFITH,
FOR THE GOVERNMENT.

Testimony of CHARLES H. GRIFFITH, called as a witness in behalf of the Government, after being duly sworn, was examined and testified as follows:

Direct Examination by Mr. McCUTCHEON.

My name is Charles H. Griffith. I am a Federal Prohibition Agent and was such on July 5th and 22d, 1927. I know the defendant and know the

(Testimony of Charles H. Griffith.)

premises and was there on July 22, 1927. On that day in the early part of the afternoon in company with agents Raney, Lambert, Kinnaird and Inspector Ballinger, we went to the McCormick place. Search-warrant was served on a man who had charge of the gasoline pumps. A casual search revealed nothing, but on further examination we found one room where there was a lot of stuff piled, some blankets and an army cot. That had recently been lined or ceiled with tongue and grooved boards. Around the walls of this room were clothes hooks. There was a space between the walls we could not account for and we discovered that by shoving upwards on the clothes hook that this tongue and groove panel boards slid up and there revealed quite a space with shelves built in. And there we found the three gallons of wine. We found no intoxicating liquors in these other caches. I went back of the building where there is [20] built a camp-house, such as you find at auto camps, and there is a line of these extending directly back. There are about eight of these rooms with spaces between built in the manner of an auto camp, all under one roof. In the end of this long building there are two toilets. There was a ladder placed against the wall leading up above the toilets. We got an ax and pried on the top of the wall and the top of the wall gave in at once. This extended the entire width of the building and was made in the shape from the eaves to the cone of the roof level with the ceiling over the toilets, making a V-shaped entrance over these toilets.

(Testimony of Charles H. Griffith.)

Inside of this cache was quite a number of kegs, gallon jugs, etc. Many of the jugs smelled strongly of moonshine whisky. While we were searching, Mr. McCormick returned and he was told that a federal search-warrant had been served. I was present at a conversation with McCormick when he first came in. I was just giving the \$28.75 in silver, two or three gold watches and some rings, that were taken from the dresser, to the man that the search-warrant had been served on. Mr. Kinnaird asked Jim how much money he had and he said twenty-five or thirty dollars and Mr. Kinnaird said, "That's right," and "We had it here and gave it to the boy." and Mr. McCormick said, "That's all right, let him keep it." I heard Mr. McCormick say to Mr. Kinnaird, "Mr. Kinnaird, have you got 'buys' on me?" and Mr. Kinnaird said, "I have had a couple of men make a purchase, purchase bottles for me, bottles of whiskey," and Mr. McCormick answered, I cannot recall in his own language but it was something to this effect, "While that might be so you never had purchased any wine from me because I had not sold any wine."

Q. Well, do you know what the reputation of this place was on July 22, 1927, as a place where intoxicating liquor was kept or sold? [21]

The same objection was made to this question as was made to the same question to the previous witness, and the objection was overruled and the defendant allowed an exception. The witness then

(Testimony of Charles H. Griffith.)

answered that it had the reputation of being a place where liquor was kept and sold.

Cross-examination by Mr. O'BRIEN.

The 22d of July is the only time I was out there. I never made a search of the place prior to that. There was no liquor found in any of the caches, except where the wine was found. I lived out in that end of town ever since I have been in Tacoma and knew Jim McCormick was living there for probably a year prior to 1927. The kitchen was arranged with the same opening as the caches we found in the bedroom, except that I believe in the kitchen there were nails in place of hooks. The camp-houses, I spoke of, are a separate building from the McCormick home. Jim McCormick told me that he owns and conducts these auto camps. He told me he wanted a place where anybody could go and have a feeling that they would be safe.

TESTIMONY OF HUGO RINGSTROM, FOR THE GOVERNMENT.

Testimony of HUGO RINGSTROM, called as a witness in behalf of the Government, after being duly sworn, was examined and testified as follows:

Direct Examination by Mr. McCUTCHEON.

My name is Hugo Ringstrom. I am a chemist in the Bureau of Prohibition in Seattle, and was such in July and August, 1927. I have seen Exhibit No. 3 in Seattle on August 5, 1927. I made an exam-

(Testimony of Hugo Ringstrom.)

ination of the contents and at that time it contained 12.29 per cent alcohol by volume. At that time it was fit for beverage purposes. The contents is red wine. It would depend [22] upon the condition of the sample at the beginning of the period, before I could see whether it would generate alcoholic content in fifteen days appreciably. It might be possible to produce eleven and one-half per cent by volume in fifteen days under weather conditions which existed between July 22d, 1927, and August 5, 1927. This Exhibit No. 3 is made from red grapes.

Cross-examination by Mr. O'BRIEN.

Mr. Kinnaird gave me the sample in Seattle and I made an analysis on the 5th day of August, it may have been the 6th. I do not know what the contents of this was on the 22d of July from my examination.

TESTIMONY OF CHARLES H. GRIFFITH,
FOR THE GOVERNMENT (RECALLED).

CHARLES H. GRIFFITH, recalled as a witness on behalf of the Government, having been previously sworn, testified as follows:

Direct Examination by Mr. McCUTCHEON.

I sampled the wine in Government's Exhibit No. 3 on July 22d, 1927, and from my experience as a Federal Prohibition Officer would say that the wine had an alcoholic content of more than one-

(Testimony of Charles H. Griffith.)

half of one per cent by volume and was fit for use for beverage purposes.

Cross-examination by Mr. O'BRIEN.

I just tasted it. It did not taste like vinegar. It did not have an acid taste but was sour.

TESTIMONY OF W. H. KINNAIRD, FOR THE GOVERNMENT (RECALLED).

W. H. KINNAIRD, recalled as a witness on behalf of the Government, having been previously sworn, testified as follows:

Direct Examination by Mr. McCUTCHEON.

I took a taste of Exhibit No. 3 on July 22, 1927 and there was no fermentation going on at that time. [23]

TESTIMONY OF L. S. DOWNING, FOR THE GOVERNMENT.

Testimony of L. S. DOWNING, called as a witness in behalf of the Government, after being duly sworn, was examined and testified as follows:

Direct Examination by Mr. McCUTCHEON.

My name is L. S. Downing. I am a soldier with the rank of sergeant at Camp Lewis, and I have been there since May, 1925. I go by the McCormick premises on my way to Camp Lewis and know where they are.

Q. Do you know what the reputation of those

(Testimony of L. S. Downing.)

premises are as a place where intoxicating liquor was kept or sold on July 22, 1927? Just answer "yes" or "no." A. Yes, sir.

Q. What was its reputation in that regard?

Mr. O'BRIEN.—The same objection as to the previous question on this subject. The court overruled. And the witness answered that it was a place where you could get a drink any time when you wanted it.

TESTIMONY OF J. M. STEWART, FOR THE GOVERNMENT.

Testimony of J. M. STEWART, called as a witness on behalf of the Government, after being duly sworn, was examined and testified as follows:

The witness stated his occupation was a captain of infantry in the United States Army at Fort Lewis.

The evidence of this witness was as to the reputation. The same objection was made as to the evidence of the prior witness, which objection was overruled and an exception allowed and the witness answered as the former witness answered.

Testimony of the Government closed.

The defendant to maintain the issues on his behalf introduced the following: [24]

**TESTIMONY OF OTTO WROBEN, FOR THE
DEFENDANT.**

Testimony of OTTO WROBEN, called as a witness on behalf of the defendant, after being duly sworn, was examined and testified as follows:

Direct Examination.

My name is Otto Wroben. I live at 90th and Union, across from the Seven Mile House. I am acquainted with Mr. McCormick and knew him the early part of July, 1927. I performed some labor for Mr. McCormick commencing on the 2d or 3d of July. On that day Jim McCormick waved at me as I drove downtown with a load of chickens—I am a poultry dealer. I made arrangements with him at that time to feed his dogs for a period commencing the 2d or 3d of July for nine or ten days. I took dog feed there every day from about the 3d of July to the 11th of July. He had three dogs. I went there every day and Mr. McCormick was not on these premises during this time. McCormick wanted to leave to go on a vacation. This is the only time I took care of his dogs.

Cross-examination by Mr. McCUTCHEON.

I fixed that date as the 2d or 3d because I was awfully busy in the poultry business and disliked to haul the feed for him. I also fixed the day because I had to make an extra trip on the 4th—I did not have any delivery downtown of my own.

(Testimony of Millard Ingle.)

I am a friend of Jim McCormick. I have lived there eight years. I got a part of land from him—just a small shack.

TESTIMONY OF MILLARD INGLE, FOR THE
DEFENDANT.

Testimony of MILLARD INGLE, called as a witness on behalf of the defendant, after being duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'BRIEN. [25]

My name is Millard Ingle and in July, 1927, I was a prohibition agent in Grays Harbor County. On the 5th day of July, 1927, I had a commissioner's hearing in Cosmopolis. I saw Jim McCormick on the 5th day of July at Cosmopolis about noon, possibly 11:30. I kept a book with a memorandum of where I was at that time. I am acquainted with Mr. Van Campen, who was a prohibition agent along about the 5th or 7th of July last year. I saw him on the 7th of July, 1927, at Aberdeen. I saw him about ten in the morning, it may have been eleven. I recall it to my mind because I was in a still west of Hoquiam, three miles, and had been there practically day and night since the morning of the 6th. Mr. Van Campen brought the meals in there to me. He did this on the 6th and 7th—he was there possibly ten or eleven o'clock in the morning.

(Testimony of Millard Ingle.)

Cross-examination by Mr. McCUTCHEON.

I left the prohibition service July 29th a year ago. I did not voluntarily resign. I was arrested by the Intelligence Department. I have known Jim McCormick for years and know where his place is. The reputation of that place on July 22, 1927, was a place which was reputed to handle liquor for the last few years off and on, different parties.

Redirect Examination by Mr. O'BRIEN.

I have been used as a witness by the United States Attorney, Mr. McCutcheon, here in this court—the last time on Tuesday.

Recross-examination by Mr. McCUTCHEON.

Van Campen brought me my meals on July 7th. He brought me one meal a day. He brought a basket of sandwiches each time and a gallon thermos of coffee, and that generally lasted me over until the next day. I was in there three days. I destroyed the still the 8th of July. He did not bring meals on the 8th because [26] I told him on the 7th. "When you come back to-morrow don't bring anything as I am going to bust it up." I saw him the last time on the 7th of July about noon.

TESTIMONY OF CORA McROBIE, FOR THE
DEFENDANT.

Testimony of CORA McROBIE, called as a witness on behalf of the defendant, after being duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'BRIEN.

My name is Cora McRobie. I live in Cosmopolis and have lived there about seventeen years and run a lodging-house there. I know Mr. McCormick and I saw him on the 5th day of July, 1927, at my place in Cosmopolis. He stayed at my place about five days, between four and five days. I saw him every day when he was there. I have known him for about three years.

Cross-examination by Mr. McCUTCHEON.

He came down there to see a friend. His name was Mr. Jennings. I fixed the date because it was after the 4th and I did not have my work done, that's why I remember when he came up after a room. I have never been convicted of a crime. I met McCormick in Cosmopolis about three years ago through his friend Mr. Jennings.

TESTIMONY OF CHARLES STEVENS, FOR
THE DEFENDANT.

Testimony of CHARLES STEVENS, called as a witness on behalf of the defendant, after being duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'BRIEN.

My name is Charles Stevens and I run a restau-

(Testimony of Charles Stevens.)

rant on Jefferson Avenue in the city of Tacoma. I am acquainted with Mr. McCormick. In the month of July I heard about Mr. McCormick being arrested—he came in and told me. A few days before the [27] 22d of July, 1927, a man drove up in front of my place and said he had ten gallons of vinegar—said it was wine that had turned to vinegar. Mr. McCormick and I bought it. Mr. McCormick took three and one-half gallons and I took the balance. I used what I took in my place of business for vinegar and pickled meat with some of it. I had occasion to test it. It was sour—nobody could drink it. Any number of people used it for vinegar. I took six and one-half gallons and McCormick took three and one-half and I gave him the jugs to take it home in.

Cross-examination by Mr. McCUTCHEON.

I have never been arrested or paid a fine.

Defense rests.

TESTIMONY OF MILLARD INGLE, FOR THE GOVERNMENT (RECALLED).

MILLARD INGLE, recalled as a witness for the Government, having been previously sworn, testified as follows:

Direct Examination by Mr. McCUTCHEON.

Mr. Van Campen was arrested the same time I was and left the service the same time I did.

Cross-examination by Mr. O'BRIEN.

I saw Mr. Van Campen about a week ago, to be

(Testimony of Millard Ingle.)

positive. I thought I saw him yesterday in Tacoma.

Government rests.

THEREUPON, the counsel for the respective parties argued the case to the jury and the Court proceeded to and did instruct the jury as follows:

INSTRUCTIONS OF THE COURT TO THE JURY.

The COURT.—You have heard the argument in this case, Gentlemen. There are five counts in this information and four of them are submitted to you for verdict, counts one, two, three and five. The fourth count has been dismissed.

On counts one and two the defendant is accused of the unlawful [28] selling of distilled spirits. In the third count he is accused of the unlawful possession of wine; and in the fifth count he is accused of maintaining a common nuisance by selling and keeping intoxicating liquor.

In each of these counts the liquor is described as containing more than one-half of one per cent of alcohol by volume and being fit for use for beverage purposes.

To each of these four counts the defendant has entered a plea of "not guilty." The entry by an accused of a plea of not guilty places the burden on the prosecution of showing beyond a reasonable doubt, by evidence, the truth of every material allegation in the case.

You will consider each of these four counts separately in reaching a verdict, and if, under all

the evidence, you have a reasonable doubt concerning any material allegation of the particular count you are considering it is your duty to give the defendant the benefit of it and acquit him. If you have no reasonable doubt concerning any material allegation of such count it is your duty to convict.

The particular date mentioned in these counts is not indispensable. That is, taking for example, the dates on which the sales are alleged to have been made, the 5th and the 7th. These dates do not have to be exactly proven. If you should be convinced beyond a reasonable doubt that the sales described by the witnesses, the prosecution's witnesses, actually were made by the defendant as described by the witnesses and as alleged, with the exception of the date, but conclude that the witness was mistaken regarding both these dates, or the particular date you are considering, why, it would be your duty to convict, although you did have a doubt regarding that exact date, or although you [29] concluded that it did not take place on that date, but about that time. But if you find that the witness was mistaken regarding the date you have a right to consider that mistake on his part in determining the credit you give him as a witness and give his testimony.

Next, regarding the two sales counts and the possession count. The amount of liquor that the defendant is accused of having sold in the first and second counts—the evidence is not indispensable that that exact amount or more amount of liquor

was sold. If the evidence convinces you beyond a reasonable doubt of the sale of a substantial amount of such liquor that would be sufficient. But the prosecution is bound to show beyond a reasonable doubt that the liquor was of the nature and character described; that is, in the sales counts that it was distilled spirits and that it contained one-half, or more than one-half of one per cent of alcohol by volume and was fit for use for beverage purposes.

You will understand the word "sell" in its ordinary sense and meaning.

So with the word "possess" in the third count where the defendant is accused of possessing wine. The word "possess" includes the idea of dominion and control, the ability to use the article possessed as the possessor sees fit.

On this matter of possession of this alleged wine; the defendant is accused of being knowingly in the possession of that wine. That word "knowingly" in the third count of the information is a matter on which you have to be convinced beyond a reasonable doubt. If he bought something he thought was vinegar and never learned any better until after it was found on his premises, why, he was not knowingly in the possession [30] of it, that is, he was not knowingly in the possession of wine, although he was in the possession of the wine but not knowingly in the possession of it.

Regarding the nuisance count. You would not have to be convinced beyond a reasonable doubt

before you are warranted in returning a verdict of guilty that the defendant maintained these premises to sell both distilled spirits and wine as alleged. The statute provides that any room, building, or place where intoxicating liquor is kept or sold is a common nuisance, and any person who maintains such a nuisance is guilty of a misdemeanor. It is for a violation of this section of the law that the defendant is prosecuted under the fifth count. The word "kept" as used in that section of the law is used in its ordinary sense. It has a different meaning than "possession." You may possess an article although your possession is fleeting and brief, but if a man keeps an article he contemplates something substantial in the matter of duration of time. This statute provides that where an accused is shown to have been in the possession of intoxicating liquor that that possession is *prima facie* evidence that the liquor was kept for purpose of sale. Before you can apply that rule to the case, however, it is necessary that you be first convinced beyond a reasonable doubt of the possession. If not so convinced you cannot apply the rule. If you are convinced beyond a reasonable doubt of the possession by the accused of such liquor, why, then the law, the statute, has made that *prima facie* evidence that the liquor was kept for purposes of sale.

Now, *prima facie* evidence is not evidence that is insurmountable. It is evidence that is sufficient, in the absence of contradiction or explanation to carry with it the presumption that, as far as this

case is concerned, that the liquor possessed was [31] kept for purposes of sale. It simply means that when the possession is established beyond a reasonable doubt, that the burden shifts from the prosecution to the defendant to explain away that possession—not to explain away the possession—but to explain it in such a way as to show that it was not kept for purposes of sale.

The Court instructed you in the progress of the trial upon this nuisance question, regarding the extent to which you could take into account the reputation of the premises, and that instruction will not be repeated.

There is no presumption arises against the accused because of the fact that he has been informed against by the prosecutor, or because of the fact that he has been brought to trial before you. Every presumption of law is in favor of the accused's innocence, and that presumption of innocence continues with every accused throughout the progress of the case, up until the time that the evidence admitted by the Court shows beyond a reasonable doubt the truth of every material allegation in the information.

A reasonable doubt is such a doubt as would cause a person of ordinary intelligence, caution and determination to pause or hesitate in one of the more important transactions connected with his own affairs. If you have that character of doubt with regard to any material allegation in the particular count which you are considering, you have a reasonable doubt to which the defendant is

entitled to the benefit and an acquittal; if you have no such doubt then you have no reasonable doubt and should convict.

You are in this case, as in every case where questions of fact are tried, the sole and exclusive judges of every question of fact in the case, and the weight of the evidence and the credibility [32] of witnesses.

In weighing the evidence and measuring the credibility of witnesses you should take into account their appearance, conduct and demeanor in giving their testimony, whether it is such as to lead you to believe that they were doing all they could to tell you the exact facts, or whether by something in the manner or appearance of the witness you are led to conclude that the witness is trying to keep from telling you all that he or she knew, or misstate that which was told so as to mislead you. Take into account whether or not other witnesses testified too willingly, have told the jury things about which they were not asked and have done so repeatedly. Take into account the reasonableness of the testimony of each witness, whether in the light of all the circumstances it appears probable or whether it appears unreasonable or unlikely. Take into account the situation in which each witness was placed as enabling that witness to know what was said or done on a given occasion, as one witness may have advantages not possessed by another, although of equal honesty. Take into account whether the testimony of a witness has been corroborated where you would expect it to be cor-

roborated if true, or whether it is contradicted by other evidence in the case.

Mr. O'Brien asks you to apply that rule in the matter of Van Campen not being here to corroborate Gralton. Now, if under all the evidence in the case you conclude that you had a right—a reasonable right to expect that if Gralton's testimony were true that Van Campen would have been here to testify in corroboration of it, and not being here you would have a right to conclude that he would not corroborate him. But if there has been a reasonable explanation given in the testimony for the absence of Van Campen [33] you have no right to apply such rule.

Take into account the interest any witness is shown to have in the case, whether that interest was shown by the manner in which the witness gave his or her testimony or by relation of the witness to the case, and the matter out of which it arose.

The defendant had the right to testify in his own behalf. He did not do so. It is equally his right to remain off the witness-stand and not testify, and the fact that he did not testify is nothing on which you have a right to rely in reaching your verdict. You have no right to draw any inference, or conclusion, or deduction to his prejudice on account of his refraining from testifying in his own behalf, and you will not allow yourself to be influenced by that fact, and not allude to it in any argument you may have in your jury-room with your fellow jurors in regard to what your verdict should be.

Mr. McCutcheon stated in his closing argument

that you will not necessarily be bound, in reaching your verdict, by the number of witnesses on a particular point. That is true. The Court has told you the various things you will take into account in measuring the credit of witnesses. However, the number of witnesses that testify for and against a particular fact or matter—rather, disregard the use of the word “fact” there—is something to be taken into account by the jury because human experience is that the greater number, other things being equal, are less liable to be mistaken than the lesser.

Regarding the nuisance count. It is not necessary to constitute a common nuisance that all the activities carried on there be unlawful. If these premises were in part used for the unlawful sale or keeping of intoxicating liquor it would be a common nuisance, although it might in part be used for purposes which were lawful. [34]

The COURT.—Is there anything further, Gentlemen?

Mr. O'BRIEN.—I want to take exception to one instruction. Do you wish me to do it at this time before the jury goes out?

The COURT.—State it now.

Mr. O'BRIEN.—I take exception to that part of your instruction in which you stated to the jury that the dates set forth in the sales counts were not necessary—not necessary that the proof should be sustained as regards these dates. My exception is that the evidence should follow the information exactly as to these dates, otherwise it takes from me

the benefit of my alibi defense which I put in, if they may speculate on some other dates. That is the reason for my exception.

The COURT.—Exception allowed.

After the jury had retired to consider the verdict the jury requested the Court to have Exhibit No. 3, designated as wine by the prosecution's witnesses, sent to the jury-room. This request was made in the absence of the defendant and his counsel and the Court sent to the jury-room Exhibit No. 3.

The jury thereafter returned to court, their verdict finding the defendant guilty on Counts One, Two, Three and Five of the information. Thereafter the defendant served and filed his motion for a new trial, which said motion was on the 13th day of October, 1928, denied. Exception allowed.

And thereupon the Court sentenced the defendant on each of the said counts.

In pursuance of justice and that right may be done the defendant presents the foregoing as his bill of exceptions and prays that the same may be approved, allowed, signed and [35] *and* certified as provided by law, and that all necessary exhibits may be properly certified as by law required.

J. F. O'BRIEN,
Attorney for Defendant.

Service of the foregoing proposed bill of exceptions, by receipt of a copy thereof, is hereby acknowledged this — day of Nov., 1928.

JOHN T. McCUTCHEON,
Assistant United States Attorney. [36]

ORDER SETTLING BILL OF EXCEPTIONS.

Now, on this 10th day of December, 1928, the above cause came on for hearing upon the application of the defendant, James McCormick, to settle the bill of exceptions in this cause, counsel for both parties being present, plaintiff and defendant agreeing that the same contained all the material facts occurring on the trial of said cause, now, therefore, it is hereby

ORDERED, that the foregoing bill of exceptions be and the same is hereby settled as a bill of exceptions in said cause, and the same is hereby certified accordingly by the undersigned Judge of this court, who presided at the trial of said cause, as a bill of exceptions, and the Clerk of this court is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals.

Dated this 10th day of December, 1928.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed Dec. 10, 1928. [37]

PETITION FOR APPEAL.

Comes now James McCormick, defendant in the above-entitled cause and feeling himself aggrieved by the verdict of the jury and judgment and sentence of the District Court of the United States, for the Western District of Washington, Southern

Division, entered on the 13th day of October, 1928, hereby petitions for an order allowing said defendant to prosecute an appeal to operate as a supersedeas and stay of proceedings under such judgment and sentence from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States for the Western District of Washington, Southern Division, and that your petitioner be released on bail in the sum of Twenty-five Hundred (\$2500.00) Dollars, the amount fixed by the Judge thereof pending the final disposition of this cause upon said appeal. Assignment of errors is filed with this petition.

WHEREFORE, this petitioner prays that an appeal to operate as a supersedeas and stay of proceedings under such judgment and sentence issue in this cause in his behalf from the United States Circuit Court of Appeals for the Ninth Circuit aforesaid for the correction of the errors so complained of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals.

J. F. O'BRIEN,

Attorney for the Defendant. [38]

Service of the foregoing petition and the assignment of errors and receipt of copies thereof is hereby admitted this 23 day of October, 1928.

JOHN T. McCUTCHEON,

Assistant United States Attorney,

Attorney for Plaintiff.

[Indorsed]: Filed Oct. 24, 1928. [39]

ASSIGNMENT OF ERRORS.

Comes now James McCormick, defendant in the above-entitled cause, and assigns the following errors which he avers occurred at the trial of said cause, which were duly excepted to by said defendant, and upon which he relies to reverse the judgment entered against him herein.

The District Court erred as follows:

I.

The Court erred in admitting the testimony of W. H. Kinnaird, a witness for the Government. The testimony of said witness being as follows:

Q. Do you know the reputation of these premises on and between the dates July 5, 1927 and July 22, 1927, as a place where intoxicating liquor was bought and kept?

Mr. O'BRIEN.—Don't answer.

Mr. McCUTCHEON.—Well, and or kept.

Mr. O'BRIEN.—If your Honor please, I object to that as incompetent, irrelevant and immaterial—not proper to show the reputation of a place where the evidence itself shows that if there has been a violation of the law. That that violation was done by the defendant himself.

Mr. McCUTCHEON.—If the reporter will read the question, I thought I did fix the time.

Question was read by the reporter.

Mr. O'BRIEN.—Same objection. [40]

The COURT.—Overruled.

Mr. O'BRIEN.—Exception.

The COURT.—Allowed.

A. It had the reputation of being a place where liquor was kept and sold.

The COURT.—The jury are instructed that the last count in this information, being the fifth count, accuses the defendant of maintaining a common nuisance on the Pacific Highway, known as the Seven Mile House, by then and there manufacturing, keeping, selling and bartering intoxicating liquor, distilled spirits, wine and other intoxicating liquor, containing more than one-half of one per cent, of alcohol by volume, fit for use for beverage purposes. Now, you will observe there are two main accusations, that is, the place, it is asserted the place was a common nuisance and asserted that the defendant maintained it as a common nuisance. Now, so far as the place is concerned, the prosecution is entitled to have evidence of the reputation of the place as a place where liquor was kept and sold considered by the jury, but so far as the question is concerned of whether the defendant had anything to do with maintaining that place—that's a separate question and you have no right to consider evidence of reputation as bearing on that last question.

Mr. McCUTCHEON.—That's all.

II.

The Court erred in admitting the testimony of Charles H. Griffith, Federal Prohibition Agent, a witness for the Government. The testimony of said witness being as follows:

Q. Well, do you know what the reputation of this place was on [41] July 22, 1927, as a place where intoxicating liquor was kept or sold?

Mr. O'BRIEN.—Just a moment; object to that question, the same objection as was made before.

The COURT.—Objection overruled. The jury will remember concerning this testimony the instruction I gave you a few moments ago regarding the testimony of the other witness regarding reputation. The same instruction will apply here.

A. Yes, sir.

Mr. McCUTCHEON.—What was it in that regard?

A. It had the reputation of being a place where liquor was kept and sold.

Q. That's all.

III.

The Court erred in giving to the jury the following instructions:

The particular date mentioned in these counts is not indispensable. That is, taking for example, the date on which the sales were alleged to have been made, the 5th and the 7th. These dates do not have to be exactly proven. If you should be convinced beyond a reasonable doubt that the sales described by the witnesses, the prosecution's witnesses, actually were made by the defendant as described by the witnesses and as alleged, with the exception of the date, but conclude that the witness was mistaken regarding both these dates, or the particular date you are considering, why, it would be your duty to convict, although you did have a doubt regarding

that exact date, or although you concluded that it did not take place on that date, about that time. But if you find that the witness was mistaken regarding the date you have a right to consider [42] that mistake on his part in determining the credit you give him as a witness and give his testimony.

IV.

The Court erred in sending to the jury-room after the jury had retired and upon their request, and in the absence of the defendant, and without his consent, Exhibit Number Three, called red wine.

V.

The Court erred in overruling the defendant's motion for a new trial.

And as to each and every assignment of errors, as aforesaid, the defendant says: That at the time of making the order and ruling of the Court complained of, the defendant duly asked for and was allowed an exception to such ruling and order, except as to assignment of error Number Four, which error occurred in the absence of the defendant and his counsel, and as to assignment of error Number Three the exception was taken to the giving of such instructions in the presence of the jury before the jury retired to consider their verdict.

J. F. O'BRIEN,

Attorney for Defendant.

Copy received this 23d day of October, 1928.

JOHN T. McCUTCHEON,

Assistant United States Attorney.

[Indorsed]: Filed Oct. 24, 1928. [43]

CITATION ON APPEAL.

The United States of America.

The President of the United States to the United States of America, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the city of San Francisco in the State of California, within thirty days from the date hereof, pursuant to an appeal, duly authenticated, and now on file in the office of the clerk of the United States District Court for the Western District of Washington, Southern Division, where James McCormick is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the party in his behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, Judge of the United States District Court for the Western District of Washington, this 7th day of November, 1928.

EDWARD E. CUSHMAN,
United States District Judge.

Service of the foregoing citation by receipt of a true copy thereof is hereby admitted this 7th day of November, 1928.

JOHN T. McCUTCHEON,
Assistant United States Attorney. [44]

ORDER ALLOWING APPEAL.

Now, on this 24 day of October, 1928, came the defendant, James McCormick, by his attorney James F. O'Brien, and filed herein and presented to the court his petition praying for the allowance of an appeal as well as an assignment of errors intended to be urged by him, and also praying that a transcript of the record, proceedings and papers upon which the judgment was rendered, after being duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

IT IS ORDERED, that the said appeal be, and the same is hereby allowed, and the defendant having deposited with the Clerk of this court his bond in the sum of Twenty-five Hundred (\$2500.00) Dollars is hereby admitted to bail pending the final determination of said cause upon the appeal.

Done in open court this 24 day of October, 1928.

EDWARD E. CUSHMAN,
Judge.

Service of the foregoing order by receipt of a true copy thereof is hereby admitted this — day of October, 1928.

JOHN T. McCUTCHEON,
Assistant United States Attorney.

[Indorsed]: Filed Oct. 24, 1928. [45]

[Title of Court and Cause.]

ORDER FIXING TIME TO PREPARE, SERVE
AND FILE BILL OF EXCEPTIONS.

This matter coming on to be heard upon the application of the defendant, James McCormick, for an order extending the time within which to prepare, serve, and lodge a bill of exceptions in the above-entitled cause, and the plaintiff being represented by John T. McCutcheon, Assistant United States Attorney, and the defendant by his attorney, James F. O'Brien, and the Court being sufficiently advised in the premises,—

NOW, THEREFORE, for good cause shown, IT IS HEREBY ORDERED that the defendant, James McCormick, may have until the 17th day of November, 1928, at two o'clock in the afternoon, within which to prepare, serve, and lodge with the Clerk of the court his bill of exceptions in said cause.

Done in open court this 13th day of October, 1928.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed Oct. 13, 1928. [46]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

Kindly prepare, certify and transmit to the Clerk

of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, the typewritten transcript of the record on appeal in the above-entitled cause, eliminating all captions, excepting the original information, to wit:

1. Information.
2. Arraignment and plea of not guilty.
3. Verdict.
4. Motion for new trial.
5. Order denying motion for new trial.
- 5A. Judgment and sentence.
6. Bill of exceptions.
- 6A. Order allowing bill of exceptions.
7. Petition for appeal.
8. Assignment of errors.
- 8A. Citation.
9. Order allowing appeal.
- 9A. Order extending time to lodge bill of exceptions.
10. Clerk's certificate to transcript.
11. This praecipe.
12. Journal entry of Sept. 28, 1928, sending Exhibit No. 3 to Jury.

J. F. O'BRIEN,

Attorney for Defendant.

304 Puget Sound Bank Building, Tacoma, Washington.

Service of a copy of the foregoing praecipe is hereby admitted this 10th day of November, 1928.

JOHN T. McCUTCHEON,

Assistant United States Attorney.

[Indorsed]: Filed Nov. 10, 1928. [47]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify and return that the foregoing is a true and correct copy of so much of the record and proceedings in the case of United States of America, Plaintiff, *versus* James McCormick, Defendant, in Cause No. 6415 in said United States District Court, as is required by praecipe of counsel for appellant, filed and shown herein as the originals appear on file and of record in my office in said District at Tacoma.

I further certify that I hereto attach the original citation in this cause with acceptance of service thereon.

I further certify that the following is a full, true and correct copy of all expenses, costs, fees and charges incurred and paid in my office on behalf of said appellant James McCormick, for making the record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, to wit:

Clerk's Fees (Act Feb. 11, 1925) for making record, certificate, etc., 106 fols. @ 15¢ each	\$15.90
Appeal	5.00
Seal50

ATTEST my hand and the seal of said District Court at Tacoma, Washington, this 7th day of January, A. D. 1929.

[Seal]

ED. M. LAKIN,
Clerk.

By Alice Huggins,
Deputy. [48]

COPY OF JOURNAL RECORD U. S. DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, TACOMA.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma in the Southern Division of said District on the 28th day of September, 1928, the Honorable EDWARD E. CUSHMAN, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal Record of said court as follows:

[Title of Cause.]

RECORD OF TRIAL (CONTINUED).

Now on this 28th day of September, 1928, defendant is in court and trial is resumed. * * * Later the jury requests that the wine introduced in evidence be sent into the jury-room and the Court orders that Exhibit No. 3 be given to the jury, and it is so done. * * * [49]

[Endorsed]: No. 5690. United States Circuit Court of Appeals for the Ninth Circuit. James McCormick, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division. Filed January 14, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.